

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-544 34 1480-D2
Issued to: Richard A. Boyles

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2075

Richard A. Boyles

This appeal has been taken in accordance with Title 46 United Stated Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 17 March 1976, an Administrative Law Judge of The United States Coast Guard at Anchorage, Alaska, suspended Appellant's seaman document for one month outright plus two months on six months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as a Tankerman on board the Barge 17, Official No. 268 871 under authority of the document above captioned, on or about 4 March 1976, Appellant failed to take adequate precautions to prevent cumulated oil on the deck of the barge from entering the navigable waters of the United States by allowing the oil to drain off the stern of the barge.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of five witnesses, and four exhibits.

In defense, Appellant offered in evidence testimony of two witnesses, and one exhibit.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending Appellant's Tankerman's Endorsement for a period of one month outright plus two months on six months' probation.

The entire decision and order was served on 17 March 1976. Appeal was timely filed on 17 March 1976.

FINDINGS OF FACT

On 4 March 1976, Appellant was serving as a Tankerman on board the Barge 17, Official No. 268 871 and acting under authority of

his document while the ship was in the port of Anchorage, Alaska. Appellant, in the course of his employment, was charged with unloading the Barge 17, a petroleum barge that had arrived at the port of Anchorage during the early morning hours of 3 March 1976. At the time of the barge's arrival at Anchorage, there was snow and ice on its deck. The barge is designed so that any liquid on deck will collect at a low point amidships, which is bordered on each side by environmental dams.

Rain and unseasonably warm weather caused the snow and ice on the deck of the barge to melt, which resulted in water being collected on the deck, and some of that water draining off the barge into Cook Inlet. A visible sheen was detected on the water collected on the deck of the barge, and in the waters of Cook Inlet adjacent to the barge. Coast Guard personnel estimated that between one-half pint and one pint of oil had entered Cook Inlet mixed with the water drainage.

Coast Guard personnel observed the unloading operation, off and on, throughout 3 March 1976 and on the morning of 4 March 1976 until the loading operation was shut down in order to thoroughly clean up the barge deck. During their observations, Coast Guard personnel instructed Appellant on proper methods for absorbing and containing any potential discharge of oil. Appellant followed the Coast Guard instructions, and the actions he took were approved by Coast Guard personnel. A negligible amount of oil entered Cook Inlet through rain water drainage and snow melt from the barge, despite Appellant's approved attempts to contain and absorb the oil.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Because of the disposition of this case, it is unnecessary to recite the specific arguments raised by Appellant.

APPEARANCE: John H. Bradbury, Esq., of Anchorage, Alaska.

OPINION

Appellant was charged with negligently failing to prevent discharge of a harmful quantity of oil into the navigable waters of the United States. In order to prove that charge, the Coast Guard must prove that Appellant failed to conform to the standard of care defined in 46 CFR 5.05-20(a) (2). That standard requires that Appellant take only those actions that a reasonably prudent tankerman would take under the same circumstances with which Appellant was confronted. It does not require Appellant to take actions beyond that standard to prevent any possible discharge.

(See Commandant's Decisions 2054(LESSE), 2011(GIMBERT), and 1982 (GOLTEN).) Nor does the presence of a harmful quantity of oil in the vicinity of Appellant's operation create a presumption of negligence requiring an explanation from Appellant.

The testimony in this case established that Appellant had acted with diligence and with all due care. The Administrative Law Judge, in this case, applied the strict liability standard of section 311(b) of the Federal Water Pollution Control Act (FWPCA) and ruled that the FWPCA standard created a presumption of negligence and a burden on Appellant to overcome that presumption. Under the judge's formulation, the very presence of oil in the water created a duty in Appellant to explain that presence irrespective of a finding that Appellant had used all due diligence in attempting to prevent a discharge.

It is true that the FWPCA creates a standard of strict liability for discharges of harmful quantities of oil onto the navigable waters of the United States, but that standard applies only to proceedings brought pursuant to the FWPCA. A proceeding under R.S. 4450 on a charge of negligence still requires that charge proved by the standard established in 46 CFR 5.05-20(a) (2), even when there is an apparent violation of the FWPCA. Similarly, in an R.S. 4450 hearing, evidence indicating only the occurrence of a discharge is insufficient to create a presumption of negligence; any discharge may or may not have been caused by negligence. Negligence in a hearing of this type must be proved, not presumed. Even if a discharge could have been proved that would give rise to assessment of civil penalty under the FWPCA, that proof could not, alone, support a prima facie case of negligence. The burden of proving remained in the Investigating Officer.

CONCLUSION

In light of the foregoing, I find that the record in this case fails, as a matter of law, to disclose any manner in which Appellant failed to live up to the standard of performance established as the test in R.S. 4450 negligence proceedings. Without substantial evidence to support the charge alleged, the order of the Administrative Law Judge must be vacated, and the charge dismissed.

ORDER

The order of the Administrative Law Judge dated at Anchorage, Alaska, on 17 March 1976, is VACATED and the charge is DISMISSED.

E. L. PERRY

Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 20th day of Sept. 1976.

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